IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-670

STOCKHAM VALVES AND FITTINGS, INC.,

Petitioner,

v.

PATRICK JAMES, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petition for certiorari inadequately describes the employment practices at the Birmingham plant of Stockham Valves and Fittings, Inc. by ignoring a consistent, overriding factor of employment at Stockham: segregation. Jobs, promotions, training opportunities, and facilities were

all assigned by race. Overt segregation continued until the trial of this case in 1974.[1/]

At least until 1965, Stockham segregated all jobs by race (A 20-21, 26-27); while there was some token integration after 1965, the historical practice of assigning employees by race and excluding black workers from the higher job classifications continued (A 23-25, 28-29, 33). Since practically all skilled hourly and supervisory positions were filled from the plant workforce, the Company maintained extensive training programs in order to prepare hourly personnel for these positions. Blacks were totally excluded from the supervisory training program until 1970[2/] and from the apprentice training programs until 1971 (A 59-62). The Company maintained a segregated work environment of separate bathrooms,

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1/ James, Winston, and Harville filed their charges with the EEOC in 1966 alleging segregated facilities and other discriminatory employment practices (A 3). Thus, the monetary liability of the Company extends to 1965. Albemarle Paper Company v. Moody, 422 U.S. 405, 410 n.3 (1975); cf. United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

2/ There was not one black foreman until May 1971, despite the fact that the Company selected the large majority of its over 100 supervisors from the hourly workforce which was over 60% black (A 69-72).

bath house, and cafeteria at least until trial in 1974.[3/]

Moreover, since the passage of Title VII the Company has substituted facially "neutral" discriminatory practices for some of its previously overt discriminatory practices.[4/] For example, in August 1965, contemporaneously with the effective date of Title VII, the Company instituted an extensive testing program which effectively precluded black workers from advancing to higher job classifications (A 45-54).[5/] The Company for

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3/ See generally A 15-19. Until 1969 the Company even assigned employees' identification badges by race: blacks received badges with numbers below 3,000 and whites with numbers above 3,000 (A 16). The record shows that, at the time of trial, racially segregated restrooms were still maintained in the dispensary (A 18 n.9).

4/ See the discussions comparing "neutral" and "intentional" practices in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977), and Dothard v. Rawlinson, 53 L.Ed.2d 786, 797 (1977).

5/ There was no testing of job incumbents but only of applicants or current employees who sought promotional or training opportunities. See Albemarle Paper Company v. Moody, 422 U.S. 405, 434 (1975). The same test, the Wonderlic Personnel Test, was used by Stockham as was used by Albemarle Paper Company.

many of its other employment decisions relied on the subjective and unguided discretion of its virtually all-white supervisory staff which, as might be expected in a company where even the facilities were segregated, resulted in severely limited promotional and training oportunities for black workers (A 32-33, 68-70).[6/]

REASONS FOR DENYING THE WRIT

1. The Fifth Circuit's Decision Is Consistent With Supreme Court Decisions, And There Is No Conflict Among the Circuits.

The analysis of the statistical evidence is not, as argued by Stockham, contrary to recent decisions of the Court. The statistical evidence presented by the plaintiffs showed an enormous disparity between the employment of blacks and

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6/ The most transparent of the Company's "neutral" practices was the age requirement instituted in 1970. In order to enter the apprentice program an employee had to be no older than 30 (excluding time in the military service). Since the Company had excluded all blacks from the program until 1971, any black worker who had reached the age of 30 prior to 1971 was permanently barred from any opportunity to apply or qualify for apprentice training (A 65).

whites by job and job class,[7/] by department,[8/] by training program,[9/] and by supervisory position.[10/]

7/ As of September 1973, of the 366 white non-incentive workers, 274 or 75% were in job classes 9-13 (the five highest paid classes) compared to only 11 or 3% of the 371 black non-incentive workers; 135 or 76% of the 178 white incentive workers were in the two highest-paid incentive job classes, 8-9, compared to 20 or 2% of the 872 black incentive workers (A 28-29).

8/ As of September 1973, 903 or 72% of all blacks in the hourly workforce worked in the foundry-related departments or shipping and dispatching departments, compared to only 75 or 13% of all whites in the hourly workforce; 208 or 36% of all whites in the hourly workforce were employed in the maintenance departments compared to 28 or 2% of all blacks.

Most importantly, of the 162 employees hired since 1965 to work in the historically white departments, 147 or 90% were white; whereas, of the 695 hired since 1965 to work in predominantly black departments, 624 or 89.8% were black (A 25).

9/ In June 1973, there were 227 whites and 6 blacks employed as craftsmen (A 59). Of the 101 employees selected into the apprentice training program since 1965 only 6 were black even though the overwhelming majority were selected from an hourly workforce which was over 60% black(A 60).

10/ In 1973, of the 120 foremen only 5 were black; there was not one black among the 26 superintendents and 6 general foremen. This (contd.)

"Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern of discrimination." Hazelwood School District v. United States, 53 L.Ed.2d 768, 777 (1977).

Stockham contends that despite these disparities the plaintiffs did not prove a prima facie case under recent decisions of the Court because they failed to prove either that there was a disparity between the percentage of blacks in skilled jobs in the relevant labor market and the percentage of blacks in the skilled jobs at the plant, or that blacks in the plant had the qualifications for training for or promotion to higher-paid, skilled jobs. Stockham errs both on the facts and on the law. The asserted issue concerning statistics simply is not presented by the facts of this case. Initially, Stockham ignores the fact that the plaintiffs' prima facie case was not based solely on statistics but was buttressed by substantial evidence of intentional

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10/ contd.
disparity cannot be attributed to discrimination prior to 1965 since over 60% of the supervisory workforce had been selected after the effective date of Title VII (A 69-71).

discrimination,[11] by the Company's use of facially neutral practices which had an adverse impact and were not job related,[12] Griggs v. Duke Power Company, 401 U.S. 424 (1971), and by examples of discrimination against individual black employees.[13] Moreover, as the record makes clear, the appropriate standard for statistical comparison is between the percentage of blacks in the Company's historically black jobs --the lower paying, foundry jobs--and the percentage of blacks in the Company's historically white jobs--the higher paying, skilled jobs:[14] (1) the Company

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11/ See, e.g.,A 33 (job assignment); A 15-19 (segregated facilities); A 71-72 (recruitment).

12/ See, e.g.,A 45-54 (Wonderlic Personnel Test); A 63-65 (high school education); A 65-69 (age requirement).

13/ See, e.g.,A 62 n.50 (Louis Winston); A 61-62 n.50 (Francis Smith); A 16-18 n.7-8 (Claude Chapman).

14/ The record demonstrates that there was substantial turnover in personnel and that the gross racial disparity in jobs at the plant was due to post-1965 practices. See, e.g., nn.8-10, supra. Cf. Hazelwood School District v. United States, 53 L.Ed.2d 768, 778-79 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 341-42 (1977).

trained the overwhelming majority of its skilled workers by on-the-job training programs or apprentice programs; (2) there were few skilled workers, either black or white, available in the labor market (A 60 n.49)[15]; (3) there was no evidence that a difference in job-relevant qualifications between white and black workers explained the gross disparity in racial job assignments (A 37-45); (4) the Company, as admitted by the plant manager, vice president and other Company officials (A 20-21), did not consider blacks, whatever their qualifications, for training programs and other "white" jobs prior to 1965, and there is no evidence to rebut the presumption that the Company's continued post-1965 staffing of jobs consistent with the historical pattern has been due to anything other than intentional racial discrimination.[16] See, Village of Arlington

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15/ The Company recruited at predominantly white schools in the area but totally refused to recruit at the predominantly black schools (A 71-72).

16/ The Company introduced evidence that there were jobs at the plant which required skill; but it introduced no evidence that the white workers who were selected to train for these jobs had necessary skills or qualifications which the black workers did not have.

Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977); Hazelwood School District v. United States, supra, 53 L.Ed.2d at 778-79 n.15.

A racial disparity in the selection of "actual applicants" has been recognized as a highly relevant statistical measure. Hazelwood School District v. United States, supra, 53 L.Ed. 2d at 778 n.13. Here the plant workforce is analogous to "actual applicants" since the Company, in the overwhelming majority of cases, selected for skilled, training, and supervisory jobs from among its present employees. In certain circumstances, as where actual pool or applicant data are inadequate or unavailable, unlike the present case, labor force or population statistics may be used.[17] Dothard v. Rawlinson, 53 L.Ed.2d

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17/ Even assuming, arguendo, that at the time of trial there was parity between the percentage of blacks in skilled jobs at the Company and the percentage of blacks in the skilled work force, and that this was the proper standard for comparison, the statistical analysis would still show a significant disparity from 1965 to 1971. During this period there were zero blacks in skilled jobs at the Company: "Nothing is as emphatic as zero." United States v. Hinds County School Board, 417 F.2d 852, 858 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970).

786, 798 (1977). Contrary to Stockham's assertions, the Fifth Circuit's reliance on the racial disparities within Stockham's work force not only is consistent with but is compelled by the recent decisions of this Court.

The Fifth Circuit's use of statistical comparisons does not conflict with decisions of the Fourth Circuit,[18/] as the Company contends. In Patterson v. American Tobacco Co., where the pertinent employment practice involved the hiring of supervisors and where the employer, unlike Stockham, hired its supervisors from outside the plant, the sole issue was whether the standard for comparison should be the proportion of blacks in the entire labor force or the proportion in the labor force category which includes supervisory personnel. 535 F.2d at 274-75.[19/] In Roman v. ESB, Inc.,

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18/ See, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976)(en banc).

19/ Even though the employer in Patterson hired a percentage of black supervisors higher than that in the labor force, the Fourth Circuit held that, while no affirmative injunction was required, the Company had violated Title VII with respect to the selection of supervisors from its own work force. Patterson v. American Tobacco Co., supra at 275.

the plaintiffs failed to demonstrate whether craftsmen or supervisors were selected by initial hire or by promotion.[20/] Accordingly, a comparison with the labor force was relevant. Significantly, the Fourth Circuit also reviewed the assignment of blacks within the plant's work force and determined that, unlike this case, there was no substantial statistical imbalance and no history of segregation. 550 F.2d at 1353-54.

2. The Fifth Circuit's Decision Is Correct.

Stockham's assertion that the Fifth Circuit incorrectly exercised its function of appellate review in reversing factual and legal conclusions of the district court requires little comment since the Fifth Circuit's exhaustively documented unanimous opinion is, itself, the best response. However, it is significant that Stockham ignores the principal factual reversal made by the Fifth Circuit. The district court found that "at no time" did Stockham assign employees by race (A 129, A 209), despite the unrebutted statistical showing that not one hourly job at

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20/ The Fourth Circuit went so far as to state that "[t]he representation in this action was inadequate as to the class." 550 F.2d at 1356.

Stockham was integrated in 1965 (A 21) and the direct admissions by the plant manager, vice president, and several supervisors that there was job segregation at the Company (A 20-21). Moreover, the district court after three days of testimony directed plaintiffs' counsel not to inquire further into job segregation because the testimony was "cumulative" and "[i]t [job segregation] doesn't need to be hammered into my head" (A 21 n.10).[21/] This finding of the lower court, and other findings reversed by the Fifth Circuit, are practically inexplicable except for the district court's unfortunate practice of adopting, virtually verbatim, over 100 pages of the Company's proposed findings of fact and conclusions of law (A 4-5 n.1).[22/] Cf. United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 (1964).

21/ The district court also stated in response to argument by counsel for Stockham, "I believe Mr. Sims [Plant Manager] testified already and he was an adverse witness and I believe the situation about jobs by race is already clear. This is accumulative (sic)"(Fifth Circuit Appendix at 717).

22/ The Fifth Circuit noted that "92 percent of the district court's factual findings are identically or substantially the same as those the (contd.)

The far-fetched nature of Stockham's argument is best exemplified by its assertion that the Fifth Circuit "far departed" from proper appellate review when it reversed the legal conclusion of the district court that Stockham was in "good faith" in integrating its segregated facilities in 1974 and that Stockham's efforts to integrate its facilities were frustrated by the EEOC's failure to perform its role of conciliation (Pet. 18). Stockham does not explain how the maintenance of segregated bathrooms, cafeterias, and bath houses until 1974 demonstrated "good faith," nor does Stockham explain how the EEOC's failure to conciliate (if in fact it did) could have frustrated for so many years the Company's efforts to tear down some walls in its plant.[23/]

22/ contd.
defendant Stockham suggested; while, 98.2 percent of the district court's conclusions of law are identically or substantially the same as conclusions proposed by Stockham" (A 4).

23/ Counsel for plaintiffs are unaware of any other Title VII case where a defendant maintained segregated facilities until 1974. For example, at the large plant of United States Steel Corporation in Birmingham the facilities were fully (contd.)

Stockham's last argument for the issuance of a writ of certiorari -- that the Fifth Circuit erred in refusing to hold that an analysis of the educational attainments of black and white workers rebutted plaintiffs' prima facie case -- is trivial (Pet. 25-29). The evidence of educational attainment is not responsive to plaintiffs' proof of intentional discrimination[24/] and unlawful facially neutral practices. Education was simply one of eight "factors" which, when taken together, defendant's expert testified, "explained" the earnings disparity between blacks and whites. However, as the Fifth Circuit's persuasive review showed, these factors incorporate the discriminatory practices of the Company in their definition

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23/ (contd.)
integrated in the early 1960s. United States v. United States Steel Corporation, 371 F.Supp. 1045, 1055 (N.D.Ala. 1973), rev'd in part, 520 F.2d 1043 (5th Cir.1975), cert. denied, 419 U.S. 817 (1976).

24/ In fact, the evidence as to educational attainment serves to emphasize the intentional job segregation at Stockham. According to Stockham's own evidence there were, in 1972, 100 blacks (as compared to 90 whites) who had 13-15 years of education and 674 blacks (as compared to 358 whites) who had a high school education; yet there was not one black apprentice at the Company until April 1971, and not one black foreman until May 1971 (Defendant's Exhibit 4, Fifth Circuit Appendix at 3872).

and thus, if anything, confirm the plaintiffs' prima facie case (A 40-42).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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